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10 Plaintiff Christopher J. Reichman

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 **Christopher J. Reichman,**
14 **individually and on Behalf of**
15 **All Others Similarly Situated,**

16 Plaintiff;

17 vs.

18 **Poshmark, Inc., a Delaware**
19 **Corporation,**

20 Defendant.

Case No: 3:16-cv-02359-DMS-JLB

**FIRST AMENDED CLASS
ACTION COMPLAINT**

DEMAND FOR JURY TRIAL

1) Violation(s) of Telephone
Consumer Protection Act of 1991.

21 Plaintiff CHRISTOPHER J. REICHMAN ("Plaintiff"),
22 individually and on behalf of the Class described below, by their
23 attorneys, makes the following allegations based upon information
24 and belief, except as to allegations specifically pertaining to Plaintiffs
25 and their counsel, which are based on personal knowledge. Plaintiffs
26 bring this action for injunctive relief and damages against
27 Defendants, and each of them, demanding a trial by jury.
28

JURISDICTIONAL ALLEGATIONS

1
2 1. Plaintiff Christopher J. Reichman is, and at all times herein
3 mentioned was, a resident of the County of San Diego, State of
4 California, who had and paid for mobile phone and text message service
5 on his phone line, 619-683-7971.
6

7 2. Defendant POSHMARK, INC. ("POSHMARK") is, and at all
8 times herein mentioned was, a Delaware corporation, doing business in
9 the County of San Diego, State of California.
10

11 3. Defendant POSHMARK is directed from its nerve center and
12 headquarters located in Redwood City, California, in the county of San
13 Mateo. California law will therefore apply to POSHMARK, even if some
14 Class Plaintiffs are not located in State of California.
15

16 4. This case is filed pursuant to the Telephone Consumer
17 Protection Act of 1991, 47 U.S.C. section 227 et. seq. The U.S. Supreme
18 Court recently decided that federal courts have federal question subject
19 matter jurisdiction over such civil actions under 28 U.S.C. sections 1331
20 and 1441. *Mims v. Arrow Fin. Services, LLC*, -- U.S. --, 132 S.Ct. 740, 753
21 (2012).
22

23 5. Plaintiff alleges on information and belief that at all times
24 herein mentioned any person acting on behalf of POSHMARK was an
25 agent of POSHMARK, expressly directed to do the acts done, whose
26 activities gave the appearance of being expressly directed by
27 POSHMARK, or whose actions were approved by POSHMARK
28

1 expressly or impliedly after the fact.

2 **NATURE OF THE ACTION**

3 6. Plaintiffs bring this class action against POSHMARK, INC.
4 (hereinafter "POSHMARK") for injunctive relief and damages and other
5 relief available at law and in equity on behalf of themselves and
6 members of the following class:
7

8 *All persons and entities located within the United States of*
9 *America to whose mobile phones POSHMARK and/or its*
10 *agents transmitted a text message without prior express written*
11 *consent anytime from September 15, 2012, to the present.*

12 7. POSHMARK is an online service with over a million users that
13 facilitates the sale and purchase of used fashionware and clothing by
14 building an online "store" or "closet" for buyers and advertising the
15 commercial availability of these wares to consumers.
16

17 8. POSHMARK's CEO, Manish Chandra, has stated that the
18 online service was designed to be a "mobile-first platform" and that the
19 ease of its use on mobile wireless devices is a major selling point.
20

21 9. The entire POSHMARK service is designed to be used from
22 mobile phones or mobile-phone like devices.
23

24 10. POSHMARK's website/app has new users create an online
25 "closet" for the clothing they wish to sell and upload pictures taken with
26 their mobile phone or device to the "closet" on the website/app.

27 11. POSHMARK touts the convenience of being able to set up one's
28 closet and upload pictures of the clothes all from the user's mobile

1 phone, but then is another reason it is mobile phone based.

2 12. POSHMARK's website/app then asks new user on her mobile
3 phone if she wants to share this information with her friends.

4 13. If the user indicates "yes," POSHMARK then sends a text
5 message to every number in the Contacts list stored in the mobile phone.
6

7 14. The advertisement invites one to view and buy the wares now
8 being sold through POSHMARK and gives a link to the POSHMARK
9 closet of the person whose Contacts list was used.
10

11 15. POSHMARK does not obtain the prior express written consent
12 of these people whose numbers are in the Contacts list before sending
13 their advertising message.

14 16. POSHMARK does not inquire whether their new user has
15 obtain the prior express written consent of these people whose numbers
16 are in the Contacts list before sending their advertising message.
17

18 17. The POSHMARK website/app does not clearly and
19 conspicuously inform users that it will send a text message to everyone
20 on the Contacts list in their mobile phone.
21

22 18. The Telephone Consumer Protection Act of 1991 ("TCPA") was
23 passed in order to regulate telemarketing and requires that a sender
24 obtain prior express written consent before transmitting SMS (Short
25 Message Service) text messages to people's mobile phones.
26

27 19. POSHMARK has intentionally violated the TCPA in a so-far
28 successful attempt to grow their mobile phone based business for years.

FACTUAL DETAILS RE NAMED PLAINTIFF

20. Defendant transmitted one (1) text message to Mr. Reichman's wireless mobile phone number (619-683-7971) wherein they tried to sell and advertise the commercial availability of clothing to him on January 25, 2015, at approximately 1:23 p.m.

21. Mr. Reichman uses his cell phone for personal and business use.

22. At some point previous to January 25, 2015, Mr. Reichman's law firm had taken on as a client one Ms. Tricia Tolentino.

23. During the course of that representation, Ms. Tolentino learned Mr. Reichman's wireless mobile phone number and saved it into the contacts of her wireless mobile phone.

24. Long after Ms. Tolentino's case had been resolved, she signed up with POSHMARK to sell some of her old clothing.

25. She followed POSHMARK's directions to set up her online "closet" and upload photos of the clothes she wanted to sell through their for-profit service.

26. POSHMARK's website then asked whether she wanted to share her closet with her friends, and she answered yes.

27. Ms. Tolentino was not informed in any way that answering yes would cause SMS text messages to be sent to every number in the contacts list maintained on her wireless mobile phone.

28. Ms. Tolentino was not informed in any clear conspicuous way

1 that answering yes would cause SMS text messages to be sent to every
2 number in the contacts list maintained on her wireless mobile phone.

3 29. POSHMARK then sent the text message alleged above to Mr.
4 Reichman's wireless mobile phone number and sent the same to every
5 other contact in Ms. Tolentino's phone.
6

7 30. POSHMARK never obtained prior express written consent to
8 send Mr. Reichman an SMS text message to his wireless mobile phone
9 number.
10

11 31. Plaintiff alleges, based on information and belief, POSHMARK
12 also sent the same text message alleged above to every number in the
13 contacts list maintained on Ms. Tolentino's wireless mobile phone.
14

15 32. POSHMARK never obtained prior express written consent to
16 send any person listed in the contacts on Ms. Tolentino's phone a SMS
17 text message to their wireless mobile phone number.

18 33. POSHMARK never asked Ms. Tolentino if she had obtained
19 prior express written consent from the persons in her contacts list on her
20 phone in order to have POSHMARK send them SMS text messages.
21

22 34. Mr. Reichman called Ms. Tolentino after receiving the SMS text
23 message, and she apologized saying that she did not know POSHMARK
24 was going to spam everyone in her contacts list.

25 35. Mr. Reichman has been harmed by the junk calls complained of
26 herein by the direct waste of his time during the SMS text message call
27 itself, the indirect waste of time in having to break from other important
28

1 tasks and spend time catching up after the junk call, the waste of
 2 telephone service which he and not Defendants must pay for, the costs
 3 of having to pursue legal remedies, and in the aggravation and
 4 consequent health effects of stress these illegal intrusions have caused.
 5

6 **CLASS ACTION ALLEGATIONS**

7 **36. Description of the Class:** Plaintiffs bring this statewide class
 8 action on behalf of themselves and a Class defined as follows:

9 *All persons and entities located within the United States of*
 10 *America to whose mobile phones POSHMARK and/or its*
 11 *agents transmitted a text message without prior express written*
 12 *consent anytime from September 15, 2012, to the present.*

13 **37.** Excluded from the Class are governmental entities, Defendants,
 14 any entity in which Defendants have a controlling interest, and
 15 Defendants' officers, directors, affiliates, legal representatives,
 16 employees, co-conspirators, successors, subsidiaries, and assigns. Also
 17 excluded from the Class is any judge, justice, or judicial officer presiding
 18 over this matter and the members of their immediate families and
 19 judicial staff.
 20

21 **38.** Plaintiffs reserve the right to modify the Class description and
 22 the Class period based on the results of discovery.
 23

24 **39. Numerosity:** The proposed Class is so numerous that
 25 individual joinder of all its members is impracticable. Due to the nature
 26 of the trade and commerce involved, however, Plaintiffs believe that the
 27 total number of Class members is at least in the tens of thousands, and
 28

1 members of the Class are numerous and geographically dispersed
2 across California and possibly the United States. While the exact number
3 and identities of the Class members are unknown at this time, such
4 information can be ascertained through appropriate investigation and
5 discovery. The disposition of the claims of the Class members in a single
6 class action will provide substantial benefits to all parties and to the
7 Court.
8

9 **40. Common Questions of Law and Fact Predominate:** There are
10 many questions of law and fact common to the representative Plaintiff
11 and the Class, and those questions substantially predominate over any
12 questions that may affect individual Class members. Common questions
13 of fact and law include, but are not limited to, the following:
14

- 15 a. Whether POSHMARK has a policy of transmitting text
16 messages to numbers on the Contacts lists of its users;
- 17 b. Whether POSHMARK obtained prior express written consent
18 from the owners of the mobile phone numbers listed in its users'
19 Contact List before transmitting one or more text messages to them;
- 20 c. Whether POSHMARK informs its users that the POSHMARK
21 website/app is going to access their Contacts list and send text
22 messaged to the numbers therein;
- 23 d. The extent to which POSHMARK transmitted text messages to
24 the phone numbers in its users' Contacts lists;
- 25 e. Whether POSHMARK's practices regarding its text message
26
27
28

1 advertising are unjust or unreasonable;

2 f. Whether POSHMARK's practices regarding its text message
3 advertising have caused POSHMARK to be unjustly enriched;

4 g. Whether POSHMARK has engaged in an unfair, unlawful
5 and/or fraudulent business practice.
6

7 **41. Typicality:** Plaintiffs' claims are typical of the claims of the
8 members of the Class. Plaintiffs and all members of the Class have been
9 similarly affected by POSHMARK's common course of conduct since
10 POSHMARK sent them unauthorized text message advertisements.
11

12 **42.** Plaintiffs seek statutory damages. Inquiry into personal
13 damages is therefore irrelevant.

14 **43. Adequacy of Representation:** Plaintiffs will fairly and
15 adequately represent and protect the interests of the Class. Plaintiffs
16 have retained counsel with experience in handling complex litigation.
17 Plaintiffs and their counsel are committed to vigorously prosecuting this
18 action on behalf of the Class and have the financial resources to do so.
19 Neither Plaintiffs nor their counsel have any interests adverse to those of
20 the Class.
21
22

23 **44. Superiority of a Class Action:** Plaintiffs and the members of the
24 Class suffered, and will continue to suffer, harm as a result of
25 POSHMARK's unlawful and wrongful conduct. A class action is superior
26 to other available methods for the fair and efficient adjudication of the
27 present controversy. Individual joinder of all members of the class is
28

1 impractical. Even if individual class members had the resources to
2 pursue individual litigation, it would be unduly burdensome to the
3 courts in which the individual litigation would proceed. Individual
4 litigation magnifies the delay and expense to all parties in the court
5 system of resolving the controversies engendered by POSHMARK's
6 common course of conduct. The class action device allows a single court
7 to provide the benefits of unitary adjudication, judicial economy, and the
8 fair and efficient handling of all class members' claims in a single forum.
9 The conduct of this action as a class action conserves the resources of the
10 parties and of the judicial system and protects the rights of the class
11 member. Furthermore, for many, if not most, a class action is the only
12 feasible mechanism that allows therein an opportunity for legal redress
13 and justice.
14
15
16

17 45. Adjudication of individual class member's claims with respect to
18 POSHMARK would, as a practical matter, be dispositive of the interests
19 of other members not parties to the adjudication and could substantially
20 impair or impede the ability of other class members to protect their
21 interests.
22

23 **CAUSE OF ACTION**

24 **FIRST CAUSE OF ACTION: TCPA VIOLATION**

25 **(On Behalf of the Entire Plaintiff Class)**

26
27 46. Plaintiffs reallege all paragraphs above and incorporate them
28 herein by reference.

1 47. Plaintiffs are bringing this action pursuant to the provisions of
2 the Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227 and 47
3 C.F.R. § 64.1200-"TCPA").

4 48. Subdivision (b)(1)(A)(iii) of section 227 of Title 47 of the United
5 States Code makes it unlawful for any person to "Make any call (other
6 than a call made for emergency purposes or made with the prior express
7 consent of the called party) using any automatic telephone dialing
8 system or an artificial or prerecorded voice...to any telephone number
9 assigned to a paging service, specialized mobile radio service, or other
10 radio common carrier service, or any service for which the called party
11 is charged for the call."
12

13 49. Both the FCC and the Ninth Circuit Court of Appeal have
14 defined a text message as a call to a wireless number for the purposes of
15 this subdivision. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953-4
16 (9th Cir. 2009); *In re Rules and Regulations Implementing the Telephone*
17 *Consumer Protection Act of 1991*, Report and Order, 18 FCC Red. 14014,
18 14115 (July 3, 2003).
19

20 50. Plaintiffs allege on information and belief that software internal
21 to POSHMARK's website/app obtains and records the numbers in users'
22 Contacts lists then transmits text messages to each of those users via a
23 connection to the Public Switched Telephone Network ("PSTN") or via
24 an Internet Protocol ("IP") interface with the PSTN, in either event
25 dialing without the intervention of human agency.
26
27
28

1 51. Regarding consent, the FCC has ruled that “a consumer’s prior
2 express consent may be obtained through and conveyed by an
3 intermediary.” *In The Matter Of GroupMe, Inc./Skype Communications*
4 *S.A.R.L Petition For Expedited Declaratory Ruling In Re Rules And*
5 *Regulations Implementing The Telephone Consumer Protection Act Of 1991,*
6 *Declaratory Ruling*, 29 FCC Rcd. 3442, 3444, at ¶ 6 (March 27, 2014). The
7 same order stressed that, “a caller remains liable for TCPA violations
8 when it relies upon the assertion of an intermediary that the consumer
9 has given such prior express consent.” *Id.* at 3445, at ¶ 14. And that “the
10 intermediary may only convey consent that has actually been provided
11 by the consumer; the intermediary cannot provide consent on behalf of
12 the consumer.” *Id.*

15 52. Speaking directly on point to the conduct at issue in this case,
16 the FCC recently ordered the following: “We clarify that the fact that a
17 consumer's wireless number is in the contact list on another person's
18 wireless phone, standing alone, does not demonstrate consent to
19 autodialed or prerecorded calls, including texts.” *Declaratory Ruling*
20 *and Order In The Matter Of Rules And Regulations Implementing The*
21 *Telephone Consumer Protection Act Of 1991*, 30 FCC Rcd. 7961, 7989 at
22 ¶ 47 (July 10, 2015) (“*2015 Omnibus Order*”).

25 53. The *2015 Omnibus Order* addressed the exact same sending of
26 text messages to every number in a website user’s Contacts list as
27 POSHMARK did here.
28

1 Procedure section 1021.5;

2 5. For costs of suit herein incurred; and

3 6. For such further relief as the Court deems proper.
4

5
6 Dated: January 15, 2017

Respectfully submitted,

7 Law Offices of David C. Beavans, APC
8

9 /s/ David C. Beavans

10 David C. Beavans, Esq.

11 Attorney for Christopher J. Reichman,
12 individually and on Behalf of All Others
13 Similarly Situated

14 Email: dbeavans@thesdlawyers.com
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, David C. Beavans, am a citizen of the United States, am employed in San Diego County, and am at least eighteen years of age. My business address is 7675 Dagget Street, Suite 140, San Diego, California 92111.

I am not a party to the above-entitled action. On the date below, I have caused service of Plaintiff's First Amended Complaint on the parties listed on ECF by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

I have also placed a copy in a separate envelope, with postage fully prepaid, for each address named below and depositing each in the U.S. Mail at San Diego on January 15, 2017:

Laura A. Stoll, Esq.
Goodwin Procter LLP
601 S. Figueroa St., 41st Floor,
Los Angeles, CA 90017

I declare under penalty of perjury that the foregoing is true and correct according to my personal knowledge.

Dated: January 15, 2017 /s/ David C. Beavans

David C. Beavans, Esq.,

Attorney for Christopher J. Reichman,
15 of 16

individually and on Behalf of All Others

Similarly Situated

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